United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-2165

To Be Argued by
ROY M. COHN

In the United States Court of Appeals
For the Second Circuit

JOSEPH DEL VECCHIO,

Petitioner-Appellant,

- against -

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

REPLY BRIEF FOR PETITIONER-APPELLANT

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plc

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the appellant, Joseph Del Vecchio, in reply to that of the Government's.

ARGUMENT

The Government concedes non-compliance with Rule 11, and therefore plain error by the court below in failing to advise appellant of the mandatory parole term (to which he was in fact sentenced), and parole ineligibility (pp. 6-9, appellee's brief). Having conceded this non-compliance with the Rule and the consistent decisional construction of it, the mandate under McCarthy, and the failure of the court below to grant the requested evidentiary hearing, appellee in effect asks this Court to ignore the situation. because (1) appellant theoretically could have received a longer term than he did if the Court below piled up counts and years (2) this issue could have been raised on an appeal (which appellant's counsel never took) thereby creating some type of estoppel against 2255, and (3) the case below was a three-ring circus with respect to other defendants who went to trial, lawyers and witnesses. As to (3), we submit that the Government's insertion (completely dehors the record of this appeal) of three lengthy footnotes pp. 3-4--is an inexcusably blatant attempt to prejudice this Court into a non-legal treatment of the conceded issues. What is the relevance to this appeal of some other defendant falling down the stairs, of "Bunny" pleading to bail-jumping, of another defendant being "murdered" or of "Jimmy Wyatt Earp" never having been identified? To the same effect is footnote on p. 15 that a new trial would be difficult for the Government. Where is that in the record of this appeal, and whose ex parte word is this Court asked to adopt if this is a basis for disregarding the plain error

below? How would the Government and the Court react if we were to argue that appellant should be forthwith freed because he is only 30 years old, has served six years actual consecutive prison time between this case and Judge Gagliardi's which is disproportionate to that of certain co-defendants, and has compelling personal and equitable arguments, can never make early parole because of the nature of the offense, etc.? Such arguments would be indefensible on our part, and a comparable orchestration by Mr. Fortuin is not worthy of his occasional fairness.

As to (2), if appellant didn't seriously urge that he was detrimentally misled, he would hardly have mounted this action, and appealed from its denial. Obviously on discovering his plight and the reasons therefore, he changed counsel and proceeded herein. There were assertions of irregularities in the affidavit of Michael Rosen, Esq filed below.
If more is desired or requisite, then appellee should have consented to the evidentiary hearing requested by appellant below. We anticipated the Government's reply that the order below was entered before the Government had even taken a position on the motion or filed papers. Consent to any evidentiary hearing can be given by appellee now.

The Government improperly attempts to prejudice the appellant in the eyes of this Court by detailing the facts surrounding his plea and the subsequent trial of his co-defendants. This detailed analysis adds nothing to the Government's case under a § 2255 application. Indeed several courts have previously held that even the guilt of a defendant is irrelevant in considering a § 2255 motion. Heidman v. United States, 281 F.2d 805, 808 (10th Civ. 1960); Watts v. United States, 278 F.2d 247, 251 (C.A.D.C. 1965); United States v. Tateo, 214 F.Supp. 560, 564 (S.D.N.Y. 1963).

According to the Government's theory, the cases of Davis v. United States, 417 U.S. 333 (1974) and Hill v. United States, 368 U.S. 424 (1962) preclude Del Vecchio's application. This is certainly not the case. We submit that there is a "fundamental defect" which presents such "exceptional circumstances" as to require the issuance of a writ of habeas corpus. We are not dealing with the technical non-compliance as condemned in Hill. The cumulative effect of errors herein can certainly meet these tests--appellant was not informed of the minimum mandatory sentence which he was subject to, of his ineligibility for immediate parole and that he was subject to a mandatory period of special parole. The record reveals and the Government concedes that this information was not imparted to Del Vecchio. While perhaps only one of these would not consitute a fundamental defect (although we do not concede this), the totality of the situation would reach this level.[1]

We are not discussing the mere failure of the District Court to inform a defendant of one of the many rights he waives by a plea of guilty. Rather, the instant issue is what type of sentence a defendant may expect and how long he might have to wait before release. Indeed the Government's own authority--Kloner v. United States, 535 F.2d 730, 733 (2nd Cir. 1976)--supports this by stating that "the defendant [must know] of 'the alternative courses of action open to' him, [citation omitted]...".

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*References denoted "G.Br." refer to Government's brief; those denoted "B" refer to appellant's brief; and those denoted "A" refer to appellant's appendix.

1. The Government argues (G.Br. 10) that under the amended law, Del Vecchio would be eligible for parole. However, this did not mean anything in terms of Rule 11. The issues is whether or not the plea was properly conducted and whether parole was available to appellant at that time. The determination of this does not hinge upon any subsequent events.

A plea of guilty foreclosesa defense, but it does not prevent subsequent inquiry as to whether or not it was freely or voluntarily made. Hudkiss v. United States, 340 F.2d 391, (3rd Cir. 1965). A plea of guilty does not necessarily involve the waiver of fundamental rights. See Duncan v. Louisiana, 391 U.S. 400, 5 S.Ct. 1065 13 L.Ed. 2d 932 (19), and the process by which it is obtained must therefore be governed by absolute fairness. Martinez v. Mancusi, (mem), 409 U.S. 959, 93 S.Ct. 273, 34L.Ed. 2d 228, 229 (Marshall, J., dissent) (1972), rehearing den. 409 U.S. 1050, 935 Ct. 532, 346 L.Ed. 2d 505.

This standard of fairness should also be extended to a court's instruction to a defendant on his plea in order to permit him to make a voluntary, knowing waiver of his rights as mandated by the Fifth and Fourteenth Amendments. It is readily apparent that § 2255 provides a ready vehicle for the protection of such rights. Section 2255 provides for relief in this instance. A conviction based upon a guilty plea not voluntarily, and knowingly made is subject to a collateral attack. Bartlett v. U.S. 354 F.2d 745, 751 (8th Cir. 1966), cert. denied 384 U.S. 945. The Court must make an inquiry into the appellant's knowledge and the voluntariness of the plea. (Bartlett,751). If the defendant does not know of all the consequences of his plea how can it then be said that the plea was voluntarily made?

The Government next argues that the appellant cannot demonstrate prejudice. Neither a showing of prejudice nor an assertion that he would not have pled guilty had he known of the mandatory special parole is a requirement for relief. The appellee asserts that Del Vecchio could have raised the issue

on direct appeal but failed to do so. There is no obligation to do so nor can the Government point to any authority requiring this. Appellee asserts (G.Br. 20) that the attorney then representing Del Vecchio was "unusually experienced in representing defendants charged with violations of the federal narcotics laws." However, we submit that this assertion is weakened merely by the facts of this case. Del Vecchio's then counsel apparently did not advise him of the full consequences of his plea, nor did he file or perfect an appeal on his behalf. Even though Del Vecchio was represented by retained counsel, this is of no moment. A plea is not made voluntary without proper advice

and a full understanding of the consequence thereof even if a defendant has counsel of his own choosing. Fultz v. United States, 365 F.2d 404 (6th Cir. 1966); see also, Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969). The burden is solely on the Government to demonstrate voluntariness. Bye v. United States, 420 F.2d 433 (10th Cir. 1970). However the Court below did not even await such a response by the Government.

In Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970), the Court held that the record as a whole did not permit a denial of a motion under 28 U.S.C. § 2255 without an evidentiary hearing where the defendant alleged that he was not advised by the Court or counsel that his narcotics conviction would render him inelegible for parole. The Court stated (at p. 437) that:

> "The practical affect of a loss of parole is '...so powerful that it translates the term imposed by the sentencing judge into a mandate of actual imprisonment for a period of time three times as long as that ordinarily expected.'

Berry v. United States, supra., 412 F.2d [189] at 192.[6] We conclude that such an effect is, with the meaning of the rule, a consequence of the plea to be carefully considered".

Had the appellant been elegible for parole, upon completion of one year of Judge Gagliardi's sentence, he could have achieved his freedom. The only thing preventing this was the instant sentence which, the record indicates, was not imposed upon the appellant with a full understanding of the potential penalty. The Government argues that because the appellant faced imprisonment for more years than the sum total of imprisonment plus the term of special parole, there is no prejudice and the sentence should be continued. The purpose of the rule providing requirement for the acceptance of a guilty plea is to insure that the accuser does not plead guilty without the full understanding of the charges against him and the possible consequences of his plea. U.S. v. Smith, 440 F.2d 521, 525 (7th Cir. 1971) In Smith the Government's contention that the defendant's expectation of a 40 year mandatory sentence and the minimum under the sentence would be 13-1/3 years if parole were available does not matter if defendant was not advised that he was ineligible for parole.

"6. Ordinarily a federal prisoner may be released on parole after serving one-third of his sentence. 18 U.S.C. § 4202. However, prisoners convicted of trafficking in narcotics receive drastically different treatment under 26 U.S.C. § 7237(d). Those convicted of violating provisions aimed at importers and sellers of narcotics (21 U.S.C. §§ 174, 176b, 184a; 26 U.S.C. § 7237(b)) are ineligible for a suspended sentence, probation or parole, although apparently still eligible for good time allowances against their sentence. 42 U.S.C. § 259; 18 U.S.C. § 4161.

The severity of the congressional policy in dealing with narcotics law violators is suggested by a comparison with some other similar penalties. Under 18 U.S.C. §§ 2113(e)&2114, bank robbery in combination with murder or kidnapping and mail robbery accomplished by wounding or jeopardizing the life of a government employee require minimum sentences of ten and twenty-five years, respectively, without provision for parole in the sentence, although probation or a suspended sentence is allowable. See, e.g., United States v. Cameron, 351 F.2d 448, 449 (7th Cir. 1965); and United States v. Hardaway, 350 F.2d 1021, 1022 (6th Cir. 1965)."

The Court states that hindsight reasoning comparing the actual sentence received with what might have been does not overcome the risk that the defendant will underestimate the risk. Rule 11 entitles a defendant to know the consequences of his guilty plea prior to the time of entering it so that he may accurately assess the consequences.in making his determination. (Smith, supra., at 526) Furthermore, few courts imposed consecutive sentences at that time. (Indeed, appellant himself was sentenced to concurrent terms.) The maximum sentence on any one count was fifteen years. Thus the appellant received three years special parole in excess of this. Since no second offender information was filed, the possibility and significance of it was rendered moot.

This Court must face the reality of the situation, It has been stated:

> "We hold that a § 2255 petitioner is entitled to relief where a court not only fails to inform him prior to his plea of his ineligibility for parole, but also incorrectly informs him at the time of sentencing that he will be eligible. These compound errors present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' Davis v. United States, supra., 417 U.S., at 436, 94 S. Ct. 2305." Gates v. United States, 515 F.2d 73, 80 (7th Cir. 1975).

Although the appellant was not incorrectly informed that he was ~~not~~ eligible for parole, he most certainly was not advised of his ineligibility. We submit that when this is coupled with the failure to advise him of the mandatory special parole (and thus the nature of it), this combination would reach the Davis "exceptional circumstances" criteria.

> "The Gates opinion also maintained the principle, enunciated in Smith (supra, 440 F.2d at 526-527), that the quality and magnitude of the error are to be

assessed as of the time of the plea and sentence, and not in the light of later events,[2] thus rejecting the Government's argument that the petitioners were not harmed by the inaccurate advice because they were sentenced to lesser penalties than the maximum of which the judge advised them. Gates, supra, 515 F.2d at 80." Bachner v. United States, 517 F.2d 589, 592 (7th Cir. 1975).

As pointed out above, the Government asserts that neither Del Vecchio nor his then counsel have submitted an affidavit in support of this petition. Nowhere is there a suggestion that this is mandated for a Rule 11 attack. Indeed the Rule specifically requires that the court address the defendant. Thus, even if further affidavits were submitted (and should this Court order an evidentiary hearing, even more substantial proof in the form of testimony could be presented), this would neither add nor detract from the merits of appellant's position in that it is the transcript of the proceedings which controls. Ferguson v. United States, 513 F.2d 1011 (2nd Cir. 1975)[3]

The appellant has already pointed out (Br. p.8) that numerous circuits have held that a defendant's inability to be admitted to parole is a consequence of a plea of guilty of which he must be advised. A number of courts have been even more specific in directing this admonition directly to guilty pleas in federal narcotics cases. United States v. Smith, supra; Durant v. United

2. This argument would also be applicable to the Government's argument concerning appellant's subsequent eligibility for parole due to a change in the law as discussed previously.

3. The Government asserts (G.Br., p. 10, fn.) that Del Vecchio never stated he was unaware of his rights at the time of the plea. Such is not the case, Not only is the entire tenor of the petition directed at the failure of the court to advise him of his rights, but indeed, the affidavit submitted in support of the petition specifically stated:

"At the time petitioner entered his plea, the Rule required that the defendant, understand 'the consequences of his plea.' As appears herein, the petitioner was not accorded his rights under the Rule." (9a)

States, 410 F.2d 689 (1st Cir. 1969); United States v. Rex, 465 F.2d 875 (6th Cir. 1972). While we have previously discussed the availability of callateral attack to this appellant, one further comment is necessary. The Government lays great stress upon United States v. Sobell, 314 F.2d 314 (2nd Cir. 1963). Judge Friendly argued that a collateral attack, since it could come at any time, should be severely scrutinized. However, the nexus of his argument was that when the attack is raised due to a change in the law affecting an aspect of his trial, this is the time for balancing his rights against that of society. In the instant case, the situation is precisely the reverse. The key is that this appellant is only challenging his plea based on the law as it then applied. He is not seeking the retroactive application of a new theory in law, but merely demanding that his rights, as they then existed, be protected.

CONCLUSION

For the aforementioned reasons it is respectfully requested that the order of the District Court be revered.

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Respectfully submitted,

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